IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 22

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND CITY OF LOS ANGELES,

Appellees.

No. 43

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER AND PETER E. MITCHELL, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,

Appellees.

APPEALS FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPELLANTS' JOINT REPLY BRIEF.

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STATEMENT.

Preliminary to a short reply to certain of the matters raised by appellees in their answering briefs, appellants deem it appropriate to make a statement concerning the relationship between these two cases. Appellees now protest that there are factual differences that make joint consideration of the two cases improper.

We have heretofore pointed out that there are certain differences between the two rail-highway intersections here involved, notably that in one instance the grades are already separated and in the other they are not. But the fact is, nevertheless, that the appellee Public Utilities Commission, in determining the assessment of grade separation costs, treated the two cases as identical, despite these factual differences, and levied identical percentage allocations (50%) against the respective railroads. Indeed, in No. 43, the *Southern Pacific* case, the Commission summarily disposed of the allocation of costs question by saying:

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, *we affirm our holding in Decision No. 47344* [the *Santa Fe* case], wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound

to follow the so-called 'benefits' theory, * * *'" (SR. App. 32)[1]

It was the *Commission*, therefore, which disregarded the factual differences in the two cases. It did so by adopting a policy of arbitrary assessment of 50% of the costs of the separation against the railroad involved *whatever* the facts showed with respect to the benefits the appellants would derive therefrom. Appellants, in their joint brief to this Court, have treated the factual differences in the two cases as immaterial to decision of the legal questions here involved because the Commission held the facts to be immaterial to its assessment of costs against them.[2]

It should also be pointed out that precisely the same arguments were presented to the California Supreme Court in both cases, that the Commission urged that court to dismiss the Southern Pacific's petition for writ of review on the ground that its earlier denial of the Santa Fe's petition "also disposes of the issues in the instant proceeding" (SR. 163-164), and that the same two supreme court judges dissented from denial of appellants' respective petitions. Nor, despite their protests, do appellees point out how the

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[1] Emphasis is supplied throughout unless otherwise indicated. References to the Commission's brief will be indicated "(Comm. br., p. . . . .)"; to the joint brief of the Cities of Los Angeles and Glendale in No. 43 as "(Cities br., p. . . . .)" and to the brief of the City of Los Angeles in No. 22 as "(L.A. br., p. . . . .)."

[2] The Court will recall that in its Statement in opposition to the Santa Fe's Statement as to Jurisdiction, the Commission stated:

> "And there is no logical or legal basis for the contention that the costs of the instant Washington Boulevard grade separation improvement be borne by the parties respectively in accordance with the benefits to be derived by them nor are any such benefits mathematically calculable. By the great weight of judicial decision above cited, *the element of direct benefit is absolutely immaterial.*" (p. 8.)

An identical statement was made in the Commission's opposing Statement in the *Southern Pacific* case (pp. 10-11). See also the briefs of appellees in the court below (SR. 132, 180), where much the same language was employed.

factual differences affect the questions presented to this Court.

Appellants' brief was prepared jointly in a good faith attempt to present the issues here involved as they were presented to the court below and with a minimum of duplication.[8]

[8] The Commission's remarks concerning appellants' use of materials of which this Court may take judicial notice overlook the fact that much of this Court's opinion in the *Nashville* case relied upon similar data, and the further fact that the Commission itself, by urging the Supreme Court of California not to grant a writ of review and thus bring up the record before the Commission (AR. 115; SR. 165), was successful in excluding this very material (contained in considerably greater detail in Santa Fe Exhibit No. 29 R.H.) from the record before this Court.

ARGUMENT.

Appellees do not take issue with the fact that *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405 was decided at a time when a revolution in highway transportation was already under way, nor with the showing made in appellants' brief that that revolution has continued to the present day with accelerated force and impact. They do not deny that the highway, particularly in California, has become a principal artery of transportation, competitive with the railroads, nor do they deny that the primary occasion for the building or enlargement of railroad-highway grade separations is now the tremendous increases in *highway* traffic rather than any change or increase in railroad operations.

With respect to the *Nashville* case, appellees again assert that it is a "single unique" decision (Comm. br., p. 15) having no applicability apart from the precise factual circumstances there involved. They lay particular stress upon the fact that Mr. Justice Brandeis, in referring to the previous decisions involving grade separations, had held them inapplicable, stating:

> "* * * No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any State." 294 U. S. at 431 (Comm. br. p. 15; Cities br. p. 27).

Appellee's reliance upon this statement reveals that they have completely misconceived the fundamental basis of this Court's decision. The *reason* why no case was found involving like conditions—the *reason*, in other words, why the older decisions were inapplicable—was that a "transportation revolution" had occurred in the meantime. Grade

separations, which were once built for the primary benefit of the railroad, were now being built primarily to serve the needs and conveniences of a competitive form of transportation. No cases "involving like considerations" were found when this Court decided the *Nashville* case because the "considerations" there involved were new. Chief among those considerations, of course, was the growth and development of highway traffic as the occasion for grade separations, and the relative decline of that of the railroads.

While the principal contentions made by appellees have been considered in appellants' opening brief, certain subsidiary matters raised by appellees will be commented on below:

I.

THE SAFETY FACTOR IN GRADE SEPARATION CONSTRUCTION.

Appellees seek to avoid application of the "benefits" principle by asserting that an accident hazard still exists at the locations of the proposed new separations, and, therefore, that the standards laid down by this Court in the *Nashville* case are inapplicable to the Commission's action here in issue. Thus the City of Los Angeles asserts in its brief in the *Santa Fe* case:

> "Safety to the public, today, as in the past, fully warrants the order of the California Public Utilities Commission complained of by appellant in the case at bar." (L. A. br. p. 27)

This contention completely misses the point made by Mr. Justice Brandeis in the *Nashville* case. The point was not that grade separations built today may not alleviate dangers to highway traffic, but rather that the factor of hazard is no longer the *principal* reason for construction of separations, but only a subsidiary con-

sideration, in respect to which the railroad may be and generally is benefited. This Court there said:

> "The *main* purpose of grade separation therefore is *now* the furtherance of uninterrupted, rapid movement of motor vehicles. * * * The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." (294 U. S. at 421-422)

Where removal of danger was once the chief or sole reason for separation of grades, it is now subordinate to economic considerations, primarily the dominating purpose of speeding up and thus reducing the cost and improving the efficiency of highway transportation.

The same point was made by the Director of the Institute of Transportation and Traffic Engineering of the University of California, when he stated in 1950:

> "During the past two or three years there has been mounting public interest in, and pressure for, increased railroad-highway crossing separation. It would appear that this pressure, which may be taken as a measure of an unfilled need, *is out of proportion to the accident hazard on the public highways.* It would appear further, that this pressure derives, in considerable measure, from irritation on the part of an ever-increasing driving public, over delay factors rather than accident hazard."[4]

Crossing protection fully adequate to remove the accident hazard at grade crossings can be installed and maintained for a fraction of the cost of the million-dollar grade separations now being built. Thus, as this Court pointed out in the *Nashville* case, there has been a marked "change in the *occasion* for elimination of grade crossings, in the *purpose*

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[4] Davis, *The Railroad Grade Crossing Problem* Proceedings of Engineering Section, 1950 Governor's Traffic Safety Conference (California), p. 31.

of such elimination, and in the *chief beneficiaries* thereof." (294 U. S., at 416)

While counsel for the Commission seek now to emphasize "safety" as a factor in these proceedings, they are careful not to assert that it was the occasion or justification of the Commission's action. The challenged orders preclude any such contention. In its brief the Commission states (Comm. br. pp. 19 and 20):

> "One of the highly important topics * * * studiously avoided by each of the appellants is the matter of safety, welfare and convenience of the comparatively large number of pedestrians using the Los Feliz and Washington Boulevard crossings."

Reference is then made to Exhibit 2 in the *Southern Pacific* case. However, the exhibit cited, introduced by the Commission's own counsel, shows that in 25 years no pedestrian has ever been hurt at the Los Feliz crossing and, in view of the safety gates and warning devices in use there, it is quite inconceivable that the record could be otherwise. (See SR. App. 87-91.)[5]

Again on page 20 of its brief, the Commission says:

> "In both proceedings the Commission, in specifically finding for the 'public safety, convenience and necessity' * * *"

This statement is contrary to the fact. In the *Santa Fe* case, in which a grade separation structure already exists, the Commission's long order does not so much as mention safety, or accident hazard as a reason for the new structures. Instead it simply affirms the findings in its prior decision that "the necessity for such widening is not due to

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[5] The Cities' bald statement that the Los Feliz crossing "has been the scene of many accidents" (Cities br., p. 14) is revealed by the record to refer to the fact that there have been exactly *14* accidents in *over 25 years*, with *total* property damage of only $5,546. The proposed grade separation will cost $1,493,200!

the activities of the railroad" (AR. 142). In the *Southern Pacific* case, where an identical percentage assessment was made against the railroad, the only reference to safety is contained in the formal conclusion of the Commission in which it is stated, in orthodox fashion, that the new separation is "in the public safety, convenience and necessity." (SR. App. 32.) See *Chicago, St. P. M. & O. Ry.* v. *Holmberg*, 282 U. S. 162, 166-167 (1930).

As pointed out in appellants' opening brief (p. 54), it is the unanimous opinion of experts that grade crossings nowadays do not present critical highway safety problems; that grade separation construction must be justified, instead, by economic considerations. Insofar as construction of a grade separation also eliminates the expense of crossing protection, the railroads are benefited; but this expense is usually quite small by comparison with the total cost of the separation. It is the large percentage of such costs, unrelated to safety, which the Commission now seeks to thrust upon the railroads.

II.

THE JURISDICTION OF THIS COURT ON APPEAL.

A. Appeal Rather than Certiorari Is the Proper Procedure.

Appellees, the Cities of Los Angeles and Glendale, argue that this Court's jurisdiction should have been invoked by petition for writ of certiorari rather than by appeal. It is significant that the Commission does not join in this argument and carefully avoids the contention made by the Cities. The cases relied upon for this proposition demonstrate the contrary with complete clarity.

In *Live Oak Water Users' Ass'n.* v. *Railroad Commission*, 269 U. S. 354, cited by the Cities, this Court had before it on writ of error a decision of the Supreme Court of

California affirming a rate order of the State Railroad Commission. This Court held that the appeal could not be allowed, although "for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature" (269 U. S. at 356), for the reason that the plaintiffs in error had not challenged the Commission's order on federal grounds in their petition to the Supreme Court of California. That court, accordingly, had not considered or passed on the federal questions raised by the application for writ of error to this Court. Applying well established principles, this Court ruled that it had no jurisdiction because the decision below was based upon a point of local law "and leaves no federal question open for our determination." (269 U. S. at 359.) This conclusion would necessarily have been reached whether plaintiffs in error had proceeded by writ of error or certiorari.*

Appellee Cities do not and could not contend that either the Santa Fe or the Southern Pacific failed to raise the federal questions in their petitions to the court for writ of review. Paragraph V of the Santa Fe's petition specifically states:

> "By its Decision No. 47344, dated June 24, 1952, the Commission * * * deprived Santa Fe of its constitutional rights to due process and equal protection of the laws, and of its property without just compensation, placing an undue burden on interstate commerce, all in violation of the Constitution of the United States of America, 5th and 14th Amendments, and the Commerce Clause, * * *." (AR. 3-4.)

There follow eight subparagraphs containing detailed specifications in support of this federal claim. (AR. 4-7.)

If more were needed, the conclusive answer to the Cities' argument is given by the order signed by the Chief Justice

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*See Robertson and Kirkham, *Jurisdiction of the Supreme Court* (Wolfson and Kurland edition), pp. 135-136.

of the Supreme Court of California allowing the appeal to this Court, in which it is noted that:

> "* * * there was drawn in question in this cause the validity of an order of the Public Utilities Commission of the State of California on the ground of its repugnance to the Constitution and laws of the United States and that the decision of this Court was in favor of its validity." (AR. 255.)

Substantially similar statements appear in the Southern Pacific's petition for writ of review (SR. 7-9) and in the order of the Chief Justice allowing its appeal to this Court. (SR. 289.)

Appellee Cities once again reiterate the contention that, because appellants have never challenged the Commission's direction that the grade separations should be built, but have based their claim that the orders are invalid solely upon the ground that the cost allocations were arbitrary and unreasonable, the state action complained of was judicial rather than legislative in nature. It follows, they contend, that certiorari rather than appeal should have been sought.

This argument, which was advanced in the Cities' motion to dismiss or affirm, was answered by appellants at pages 79-84 of their opening brief. The anomaly of the Cities' argument may be highlighted, however, by several considerations.

First, the Public Utilities Commission asserted in the decisions here involved that in allocating the costs of the separation structures it was exercising delegated legislative power.[1] Again, in its answer to the Santa Fe's petition for writ of review, the Commission pleaded that "its

[1] It explicitly declared that the very phase of its order which allocated costs was an exercise of police power and therefore the Commission is not bound to follow the benefits theory. (AR. 130; SR. App. 32.)

decisions in the execution of such legislative authority *have the same force and effect as a statute enacted by the Legislature;*" that "the test of the constitutionality applicable to a statute applies equally to the constitutionality of the decision involved here.'" (AR. 105.) The Cities are thus attempting to convert an act done by the Commission under its "legislative authority" into a judicial act.

Second, Los Angeles, itself, in its answer to the Santa Fe's petition for writ of review, stated:

> "The California Public Utilities Commission, in its Decision No. 47344, from which petitioner is seeking a writ of review, clearly set forth the law when it stated:
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> * * * * *
>
> 'The authority of this Commission to allocate cost * * * *is an exercise of the police power* on the part of the State of California through the medium of its agency, the Public Utilities Commission. * * * .'" (AR. 157-158.)

Moreover, the City prefaced one section of its argument before the courts below with the statement that the assessment of grade separation costs against the railroads "* * * is a proper exercise of police power by or on behalf of the sovereign." (AR. 159.) The City of Los Angeles is thus in the position of having urged before the Supreme Court of California that the allocation of grade separation costs was an exercise by the Commission of delegated *legislative*

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[8] Oddly enough, in their joint brief to this Court in the *Southern Pacific* case, the Cities of Los Angeles and Glendale, after adopting the argument made in the *Santa Fe* case that the Commission's allocation of costs is a judicial act (Point I), then join in the argument that the Commission's action was legislative in character, and that its allocations of costs therefore carry the "presumptive validity" of a statute (Point II).

authority,[9] yet of contending before this Court that it was an exercise of *judicial* power.

Finally, the Cities attempt to distinguish *Grand Trunk Western Ry. Co.* v. *Railroad Commission*, 221 U. S. 400 (1911), a precise authority on this issue, on the ground that it involved the question whether an order allocating costs was a "law of the state," within the meaning of the contract clause of the Constitution, rather than "a statute of any state" within the meaning of Title 28 U. S. C. Section 1257(2). Without considering whether the two phrases are in all respects synonymous, the fact remains that in the *Grand Trunk* case this Court stated that a railroad crossing cost allocation order "is a legislative act by an instrumentality of the state exercising delegated authority (*Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 226), is of the same force as made by the legislature, *and so*, is a law of the state within the meaning of the contract clause of the Constitution." 221 U. S. at 403. In other words, this Court held that the order was a "law of the state" for the same reason that administrative orders are held to be "statute[s] of any state," namely, that they are legislative acts by an instrumentality of the state.

B. Even if Appeal Were Improper, this Court Would Consider the Cases Under Its Certiorari Jurisdiction.

Appellee Cities, proceeding from the faulty premise that the Commission acted judicially in allocating costs and that the certiorari route should have been followed, next argue that this Court cannot consider the merits of these cases on certiorari. The argument seems to be that

[9] The sovereign of course exercises the police power by legislative acts. "The Legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution." *Frost* v. *City of Los Angeles*, 181 Cal. 22, 28, 183 Pac. 342, 345 (1919).

since the Supreme Court of California refused to order up the record before the Commission, this Court is foreclosed from reviewing the Commission's "judicial" action. (Los Angeles Brief, Point II.) The asserted reason for this is that the Commission's order cannot be considered on its face because its validity depends upon the particular facts, and that all of these facts are before the Court. (Los Angeles Brief, Point III.)

But the only method of reviewing an order of the California Public Utilities Commission is by petition for writ of review addressed to the State Supreme Court. *Public Utilities Code of California*, §§ 1756, 1789. While such judicial review is discretionary with the court, it is unquestioned that denial of the petition operates as an affirmance of the Commission's order. The record before the Commission is not before the court when it acts upon the petition; rather, the statute contemplates that the writ of review, if granted by the court, "shall direct the commission to certify its record in the case to the court." (*Id.* § 1756.) Appellants' petitions specifically requested:

> "That the writ of review issue out of this court to the Public Utilities Commission, demanding it to certify fully to this court, at a specified time and place, the record and proceedings in this cause, that the same may be inquired into and determined by this court." (AR. 7; SR. 9.)

Thus, by refusing to grant the writs, the Supreme Court of California refused to call up the record of the proceedings before the Commission. The records filed by appellants in this Court constitute the entire records that were before the state supreme court.

The Cities' position is that their success in inducing the court below not to call up the records before the Commission defeats review by this Court of the federal questions presented under any procedure. We submit, on the con-

trary, that the action of the Supreme Court of California makes this Court's task much more simple and precise. The Commission held unequivocally that in allocating grade separation costs it was exercising police power and, *therefore*, was not required to consider the facts as to the benefits to be received by the railroad from the new construction. Nor was its 50% assessment related in any way to an evaluation of such benefits; in both cases the Commission took pains to assert that "we are not bound to follow the so-called 'benefits' theory." (AR. 130; SR. App. 32.)

These matters, plus the basic facts surrounding the controversies, were presented to the Supreme Court of California in appellants' petitions for writs of review. That court affirmed the Commission's holding on the merits without having before it the records before the Commission. In short, the California court took precisely the same position as did the Supreme Court of Tennessee in the *Nashville* case, namely, that because an arbitrary assessment against the railroad represented an exercise of police power, it was unnecessary to inquire into the facts. The refusal of the Supreme Court of California to call up the record and to consider the facts is erroneous for exactly the same reason that it was error for the Tennessee court to refuse to consider the facts in the *Nashville* case. That, indeed, is one of the errors specified by appellants in these cases. (Brief p. 13.)

The Cities' contention that this Court cannot review the Commission's "judicial" action is thus frivolous. This Court now has before it the entire record that was before the Supreme Court of California when it denied appellants' petitions for writs of review. The Cities do not suggest that the California court had no jurisdiction to pass on the validity of the Commission's order or that it erred in doing so. Reduced to its essentials, therefore, the completely baseless contention of the Cities is that this

Court cannot review the validity of the Commission orders under the Constitution of the United States even though the Supreme Court of California did so *on precisely the same record.*

III.

MISCELLANEOUS POINTS RAISED BY APPELLEES.

Certain statements and arguments made by appellees in their briefs deserve brief reply, although none touches the basic issues presented by these appeals. Such statements will be considered *seriatim:*

A. The Scope of the Grade Separation Program in California. (Cities br. p. 39.)

In the *Southern Pacific* case the Cities state that the appellants are unduly concerned by the great and increasing number of grade separation projects being pressed in California: "It should suffice to say that the plan for the separation of grades at many grade crossings has been under consideration for almost 30 years." (Cities br. p. 39.) A pertinent comment upon this complacent observation is to be found in a communication from the State Highway Engineer of California, dated September 18, 1953, to the Chief Engineer of the Santa Fe (set forth as Appendix A hereto) in which, after referring to the addition of four more grade separation projects to the 1953-54 highway construction program, he declares:

> "It is reasonable to assume that the Public Utilities Commission will follow the precedent set down in the Washington Boulevard case whereby the railroad would be ordered to pay 50% of the cost of widening."

The program of separating grades in California, as else-

where, has accelerated greatly in recent years. As noted above (p. 7) a University of California transportation expert stated in 1950:

> "During the past two or three years there has been mounting public interest in, and pressure for, increased railroad-highway crossing separation."

B. "Grade Separation [Costs] Are Passed on To the Rate Payers of the Railroad in the Form of Rates." (Comm. br. p. 17.)

The Commission seems to suggest as an answer to appellants' contentions that the railroad's grade separation costs can simply be passed on to rate payers in the form of higher rates. This assertion well illustrates the Commission's refusal to consider present-day realities. The fact is that the railroads cannot pass on grade separation costs because these very expenses go to improve the operating efficiency and to lower the costs and rates of their highway competitors. Increasing railroad rates to build highway improvements simply widens the gap that now exists and drives more business to trucks, buses and automobiles. It is uncontradicted in the record that:

> "It is impossible to pass the costs of a specific project such as this by increasing rates, although the railroads' shippers will eventually have to stand the costs. There are frequent calls for the railroad to contribute to the costs of such structures in other states. The effect of such contributions is to make it more difficult to meet competition." (AR. 30-31.)

This Court recognized the same problem when it referred, with respect to passenger traffic, to

> "the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficits by in-

creasing passenger rates." *King* v. *United States*, 344 U. S. 254, 262 (1952).

Thus, the short answer to the claim that arbitrary grade separation costs can be passed on in the form of higher rates is that, under present conditions, they cannot.

C. "Appellant's Allocated Costs Are Only 35% of the Total Cost of the Improvement." (L. A. br. pp. 6-8.)

The City of Los Angeles states, although in what connection is not clear, that the Santa Fe is paying only 35% of the total cost of the improvement and only 40.6% of the "added cost occasioned by the presence of the railroad structures." This claim is flatly contradicted by the Commission's decision and order, which states that the cost of the bridges will be $569,355, half of which is allocated to the railroad, and that:

> "The remaining costs are clearly attributable to the paving and widening of the street." (AR. 130.)[10]

The City has never questioned this conclusion either by petition for rehearing before the Commission or by petition to the Supreme Court of California. The City is thus apparently attempting to tax the railroads with costs, such as paving and sewer expense, which it would have incurred in widening the street in any event.

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[10] The Commission specifically stated in its order:

> "1. Fifty per cent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the costs shall be borne by the City of Los Angeles." (AR. 131.)

D. "Appellant Has No Property Right in the Continued Maintenance of Such Structures Which Will Support a Constitutional Right to Compensation." (L. A. br. pp. 22-25.)

The argument of the City of Los Angeles in Point IV of its brief (L. A. br., pp. 22-25) that the Santa Fe's present separations constitute a "barrier" across its easement was neither adopted by the Commission in its order nor argued in its briefs and is, of course, inapplicable to the *Southern Pacific* case. It is an anomaly to argue that the presence of existing separation structures which were placed in their present location by the joint action of the city and the railroad now justify the imposition of arbitrary costs upon the railroad for construction of *new* separation structures, made necessary by increased highway traffic. See also AR. 238-240. This contention that a separation structure may be ordered into place and later, for the purpose of assessing costs, be deemed to have become an "obstruction," is simply another form of attack upon the benefit principle and is completely contrary to the rationale of this Court's decision in the *Nashville* case.

Dr. A. Kenneth Beggs, in his extensive study of the grade crossing problem, commented on this so-called barrier theory as follows:

> "Two charges may be leveled against this basis of cost distribution. First, its contentions are not substantially true. The railroads have been an important aid rather than a barrier to economic and social development in areas of the state which they serve. To insist that the railroad is a barrier is an argument for relocation of railroads, not merely the elimination of crossings or an increase in the portion of costs a railroad should be assigned for improvements. In addition, the barrier theory provides no basis upon

which to distribute costs as between the railroads and the public. Reliance must be placed upon subjective opinions by the Commission as to what may be traditional, acceptable, and reasonable amounts to assign to railroads. The basis has no relationship to economic principles which should govern in cost allocation."[11]

E. The Position of Appellants as Owners of Highway Transportation Companies. (Comm. br. p. 5.)

The Commission makes reference to the fact that appellants are the owners of subsidiaries which operate highway vehicles. The implications of the statement are not clear. The Commission certainly is not suggesting that one rule of law should apply to railroads which own highway vehicles while another totally different rule applies when no such relationship exists.

If what the Commission implies is that owners of highway vehicles (including appellants' subsidiary companies in this case) receive and should pay for the benefits resulting from grade separation construction, we agree wholeheartedly. Whatever the taxes imposed upon such subsidiaries, in common with other highway users, to pay the cost of highway improvements, such taxes will be and are being paid. (SR. 213.)

F. Appellants' Statement of the Facts. (Cities br. pp. 2-3.)

The Cities in their brief in the *Southern Pacific* case assert (pp. 2-3) that appellant's statement "did not give a fair picture of the facts;" that throughout the proceedings in the court below appellant had referred to and urged only the evidence presented before the Commission most favorable to it, and had ignored or incorrectly stated

[11] Beggs, *The Railway-Highway Grade Crossing Problem*, Stanford Research Institute, Stanford, Cal. 1952, p. 50.

other facts.[12] This assertion may be compared with the Cities' statement in their brief to the court below, commenting upon the Southern Pacific's petition to that court (SR. 167):

> "The evidence as summarized by petitioner in its brief is quite comprehensive; however, certain additional evidence should be noted, and other evidence emphasized."

Following this statement the Cities presented a page and a half of summary, largely repetitious of matters appellant had already presented. The Commission accepted the Southern Pacific's summary of evidence without comment. Moreover, the Supreme Court of California apparently considered the statements adequate for its purposes, since it refused to order the record brought up. Indeed as pointed out above (*supra*, p. 14), appellees themselves, by their answers in the court below, urged it to refuse to consider the record in its entirety.

G. Erroneous Statements of the Record in Appellees' Briefs. (Passim.)

The briefs of the Cities of Los Angeles and Glendale contain a number of inaccuracies carried over from their briefs before the California Supreme Court in opposition to appellants' petition for writ of review. For example, in their joint brief in the *Southern Pacific* case, the Cities state that the number of freight movements across Los Feliz "has increased materially since 1936" (Cities' br. p. 15), citing as a record reference the Cities' brief before the state court. But the inaccuracy of that statement had been demonstrated in the Southern Pacific's reply brief

[12] No similar assertion is made in the *Santa Fe* case, although that case has been presented in the court below, and in this Court, in the same manner as the *Southern Pacific* case.

below (SR. 251-253), where it was also pointed out that the switching movements at Los Feliz have been static for many years. Similarly, the statements in the Cities' brief regarding "public safety hazard" and "backlash" of traffic (Cities' br. pp. 3, 14-15) are completely refuted by the only evidence on the subject, which was set out in full below at SR. 253-254.

H. State Cases Referred to By Appellees. (Cities br. pp. 29-34; Comm. br. p. 11.)

Reference is made by appellees in their briefs to several state court decisions involving grade separation costs, although the significance of such decisions, even if they supported appellees' position, is not clear in view of this Court's decision in the *Nashville* case. That they do not support the Commission's action was pointed out in detail below. (SR. 256-259.) In cases decided subsequent to the *Nashville* decision, state courts have applied this Court's reasoning in rejecting arbitrary assessments against railroads. See, *e. g., In re Elimination of Existing Highway-Railroad Crossing* (App. Div.), 5 N. Y. S. 2d 946; *In re Elimination of Highway-Railroad Crossings*, 299 N. Y. S. 693; *W. J. Howey Co.* v. *Williams*, 142 Fla. 415, 195 So. 181, 183-184.

CONCLUSION.

Appellees all assert that the Commission did not employ the benefit principle from 1933 to the date of its decision in these cases, as appellants had indicated, that it is difficult or impossible to determine benefits, and that adoption of the benefit basis would lead to delay in grade separation construction. Brief answers may be made.

First, with respect to the Commission's former posi-

tion, appellants pointed out (brief, p. 65, note 62) that in 1933 the Commission stated specifically that grade separation costs were allocated: "Some cases by agreement, others by Commission allocation as measured largely by benefits." This statement, and the Commission's language in the *Goshen Junction* case (see brief, pp. 64-65), speak for themselves. Moreover, Beggs, in his study heretofore cited, makes this comment regarding the Commission's decision in No. 22, the *Santa Fe* case:

> "With this decision the Commission has retracted from its position on distributing costs in accordance with benefits and has reverted to its former position of a fifty-fifty division of costs between the railroads and the public."[13]

We quite agree that the Commission may "take inconsistent action in different cases" (Comm. br., p. 13). Some further explanation seems required, however, when a fundamental change in conditions has long been recognized and the shift of position results in repudiation of a principle of constitutional law recognized by the Supreme Court of the United States.

Second, the short answer to the claim that benefits are difficult to ascertain is that the California Commission and the regulatory authorities of other states and countries have made that very determination for many years. Indeed, the Commission actually made the calculation in the *Southern Pacific* case (SR. App. 28) in determining the economic justification of the Los Feliz separation, but then simply refused to employ those figures in order to determine benefits, or give them any weight for the purpose of the allocation.

Third, the Commission's ill-considered statement (Comm. br., p. 25) that appellants' reliance upon the benefit basis of cost allocation is an attempt to defeat all grade separa-

[13] Beggs, *op. cit. supra* (note 11), pp. 51-52.

tion projects "through prolonged and futile negotiations" simply is not true. For the entire period 1934-1950, when the Commission applied the benefit theory, agreement between the parties was reached in 86 cases involving the Southern Pacific and its affiliates, and Commission decisions were required in only 5 cases. (SR. App. pp. 92-97) Moreover, as was pointed out in appellants' opening brief (p. 60), one of the reasons advanced by the National Conference on Street and Highway Safety in 1924 for adoption of the benefit basis was the fact that, under the arbitrary allocation principle theretofore applied, progress with railroad grade crossing elimination was slowed by the natural reluctance of railroads voluntarily to enter into crossing elimination programs.

The railroads are sincerely interested in the grade crossing elimination programs now in progress throughout the nation. For example, railroad representatives participated in the proceedings leading to the adoption of the comprehensive grade separation program of the Los Angeles County Grade Crossing Committee. But appellants earnestly believe and contend that the imposition upon one small group, the railroads, of a large arbitrary percentage of the cost of promoting the public convenience violates principles of justice and reasonableness made manifest by this Court in its decision in the *Nashville* case.

Respectfully submitted,

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APPENDIX A.

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
SACRAMENTO

Divn. of Highways,
Public Works Bldg.,
P. O. Box 1499,
Sacramento, 7

El Nido Underpass
VII-LA-164-Tor

Sept. 18th, 1953.

Mr. L. H. Powell, Chief Engineer,
The Atchison, Topeka & Santa Fe
Railway Company,
121 East Sixth Street,
Los Angeles 14, California.

DEAR MR. POWELL:

Reference is made to our letter of September 16 wherein you were advised that four grade separations will be added to the current 1953-54 Highway Construction Program, including the proposed widening of the existing El Nido Underpass, Crossing No. 2H-19.0-B, Hawthorne Avenue in Torrence, State Highway Route VII-LA-164-Tor.

Since Hawthorne Avenue is not a Federal Aid Route, it is not eligible for financing with Federal funds and consequently Bureau of Public Roads G. A. M. #325 will have no application to the apportionment of the cost of widening the underpass structure.

The proposed widening is factually similar to the proposed widening of the Washington Boulevard Underpass in Los Angeles. The Public Utilities Commission, by Decision No. 47344 dated June 24, 1952, apportioned 50% of the cost to the railroad. Since that case is on appeal and it is likely that considerable time will expire before a final determination is made, we wish to express to you our views with respect to the apportionment of costs of widening the El Nido Underpass. We believe that under the circum-

stances where the El Nido Underpass and the Washington Boulevard Underpass are similarly situated, it is reasonable to assume that the Public Utilities Commission will wish to follow the precedent set down in the Washington Boulevard case whereby the railroad would be ordered to pay 50% of the cost of widening. We, therefore, hereby formally request the Santa Fe to bear such proportion of the cost of widening the El Nido Underpass. If the railroad does not see its way clear to accept apportionment of cost on the basis of 50%, we believe that the matter should be submitted to the Public Utilities Commission for determination with a request for an interim order authorizing construction in order not to delay completion of the contemplated public improvements, with the understanding that the interim order authorizing the proposed widening shall provide that the costs shall be apportioned in accordance with an agreement to be arrived at between the railroad and the State or in the event the parties cannot agree, the apportionment of costs shall be determined as provided by law.

Your prompt consideration of the Department's proposal with respect to the apportionment of cost is earnestly solicited.

Pending your consideration of the railroad's contribution to the project, we request your approval to proceed with the construction in accordance with plans and specifications which have been submitted to you for approval.

Very truly yours,

(signed) G. T. McCoy,
State Highway Engineer.